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The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet

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THE GOOD, THE BAD AND THE UGLY: CRIMINAL LIABILITY FOR OBSCENE AND INDECENT SPEECH ON THE INTERNET

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Talk is not cheap, and speech is not necessarily free. Though "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .,"¹ the Supreme Court has excepted certain categories of speech from this protection. Of importance here is the Court's treatment of sexually explicit speech, whether termed "obscenity" or merely "indecency." In *Roth v. United States*,² the Supreme Court expressly excluded obscenity from the class of speech deserving First Amendment protection. More than twenty years later in *FCC v. Pacifica Foundation*,³ the Court held that the government may also regulate the dissemination of indecent speech where minors or unwilling adults are concerned. Although the Court has altered the doctrinal analyses of these two categories of speech, many of the fundamental touchstones remain in place.

As the twenty-first century approaches courts will be faced with the burdensome task of applying these doctrines to a new form of technological communication, computer networks.⁴ The courts will

1. U.S. CONST. amend. I.

2. 354 U.S. 476 (1957).

3. 438 U.S. 726 (1978).

4. For the purposes of this article, the terms "computer networks," "information superhighway," "Cyberspace," and "Internet" are used interchangeably. Although they may not be precise substitutes for one another, for the purposes of this article, any distinctions are not meaningful.

have to determine whether the relevant characteristics of this new technology render the older versions of the obscenity and indecency frameworks inapplicable or outmoded. In general, the courts will have to strike a delicate balance between the people's right to free speech and the government's interest in protecting society from offensive speech. In striking this balance, courts will face difficult issues such as what speech gives rise to criminal liability, who can be held liable for such speech, and whether the new technology provides adequate safeguards to protect society from unwanted exposure to objectionable speech.

This Article discusses how current law regarding sexually explicit speech can be applied to the Internet, and the fundamental principles underlying the current balance between individual rights and governmental interests. Part I of this Article describes the pertinent characteristics of computer networks, and discusses the availability of sexually-oriented materials thereon. Part II analyzes the relevant evolution of obscenity law. Part III examines one of the major elements in judging obscenity—the “contemporary community standard”—and argues in favor of applying a “national community standard.” Part IV explores the relevant law regarding indecent speech as applied to other communicative media, and discusses the implications in the context of the Internet. Part V discusses the liability of computer network operators arising from obscene or indecent messages posted by network users. Finally, Part VI presents potential solutions to the conflict between freedom of speech and governmental protection of society.

I. COMPUTER NETWORKS

A. *Fundamental Characteristics*

The “information superhighway,”⁵ touted as the dominant communications medium of tomorrow, is a global system of interconnected computer networks. It offers a relatively easy way for anyone with a computer, modem, and telephone line to instantaneously and interactively communicate with other people throughout the world.⁶

5. The term “information superhighway” was first made popular by then-Senator Al Gore. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 n.3 (1994) [hereinafter *Message*].

6. See Robert F. Goldman, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1083 (1995) (noting that new “World Wide Web” software has made it easier to access on-line information by integrating the “use of the mouse in a ‘point and click’ windows environment with search services which previously would have required greater computer knowledge”); Eric Handelman, *Obscenity and the Internet: Does the Current*

The Internet is the largest international computer network,⁷ linking together more than 40,000 independently managed computer networks,⁸ including tens of thousands of universities, laboratories, governmental entities, corporations and individuals in over 100 countries.⁹ Bound together as a "collection of networks,"¹⁰ the Internet is not owned or controlled by a single entity¹¹ and has "no central governing authority."¹² So far, it has remained essentially self-regulated and operates by informal agreement among its users and by formal agreement among local network operators.¹³

The Internet has attracted approximately thirty million users,¹⁴ a

Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?, 59 ALB. L. REV. 709, 737 (1995); Joanna H. Kim, *Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 LOY. L.A. ENT. L.J. 415, 416-17 (1995); Norman Redlich & David R. Lurie, *First Amendment Issues Presented by the "Information Superhighway"*, 25 SETON HALL L. REV. 1446-47 (1995).

7. See Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50. The Internet was originally created by the National Science Foundation in the mid-1980s. See Kim, *supra* note 6, at 417. Its principle design feature was to ensure that a severed link in a connection could easily be circumvented by rerouting, for the purpose of preventing outages caused by a nuclear or terrorist attack. Carlin Meyer, *Reclaiming Sex From the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1989 n.108 (1995); Kim, *supra* note 6, at 418. Thus, from a purely practical standpoint, enforcing censorship of the Internet may prove to be very difficult.

8. Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories*, 83 GEO. L.J. 1849, 1862 (1995); see Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 36 (1995) (claiming that the actual figure is closer to 45,000 separate networks).

9. *Message*, *supra* note 5, at 1066-67 (reporting that commercial network service providers offer their users a variety of electronic information services, including "sports scores, news, computer games, and a host of other data bases, some of which even permit users to download data onto their own computers"); see William Grimes, *Computer as a Cultural Tool: Chatter Mounts on Every Topic*, N.Y. TIMES, Dec. 1, 1992, at C13.

10. M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1693 n.37 (1995).

11. Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, at 62.

12. See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 200-01 (1995).

13. *Id.*; Jeffrey E. Fauceite, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. 1155, 1181 (1995) (claiming that the Internet has managed widespread growth while being virtually unregulated by government, school or business). Kim, *supra* note 7, at 419 (theorizing that the Internet currently exists in a "state of suspended anarchy") (quoting Carla Lazzareschi, *Wired: Businesses Create Cyberspace Land Rush on the Internet*, L.A. TIMES, Aug. 22, 1993, at D2).

14. Cate, *supra* note 8 at 36. The three largest network providers, CompuServe, Prodigy and America Online, have almost 6 million subscribers alone. *Id.*

number which has grown exponentially in just the past few years.¹⁵ It is predicted that the number of Internet users will reach 100 million by 1998, with close to one billion people hooking into Cyberspace by early next century.¹⁶ Through the Internet, users can access the Usenet, a collection of more than 14,000 newsgroups which allows users to discuss an infinite variety of topics.¹⁷ Usenet services are similar to Bulletin Board Services (BBS), which also offer users the opportunity to share information and communicate with other users. However, a BBS does not have a diffuse configuration like the Usenet, but rather it is usually operated from a central location¹⁸ by a system operator (sysop).¹⁹ Furthermore, a user must generally subscribe to the BBS to gain access to its files.²⁰

Presently, there are two general categories of network services available through the Internet: (1) computer-mediated communication services, which allow users to communicate through electronic mail, bulletin boards and conferencing systems; and (2) resource sharing services, which grant access to databases and files.²¹ Current technology enables computer users to scan images from printed sources or create life-like computer generated images, and store these images in their computers.²² Current technology also enables computer users to upload (send), download (receive) or view both text

15. See Cate, *supra* note 8, at 36 (estimating that the Internet is growing by 750,000 new users per month); Goldman *supra*, note 6, at 1081 (stating that the growth of new users, which is between 15% and 25% per month, is so rapid that estimated figures are obsolete long before they are published).

16. PAUL GILSTER, *THE NEW INTERNET NAVIGATOR* 19 (1995). The term "Cyberspace" was coined by William Gibson in his novel "Neuromancer." EDWARD A. CAVAZOS & GAVINO, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD* 1 (1994).

17. Goldman, *supra* note 6, at 1086 (stating that Usenet newsgroups may offer an area of special interest to attract "like-minded users"); see Faucette, *supra* note 13, at 1162 (maintaining that messages posted to the Usenet are only temporary, and are usually removed within a few days of posting to make room for new messages).

18. See Rimm, *supra* note 8, at 1863-64.

19. Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 993 (1994) [hereinafter *Peep*]. This article uses the term "sysop" in reference to system operators of networks, regardless of the type of computer network structure involved.

20. Rimm, *supra* note 8, at 1864.

21. *Peep*, *supra* note 19, at 993 n.22; see Cate, *supra* note 8, at 36 (stating that there are also three types of service providers: users, electronic service providers who offer on-line services, and intermediaries who supply the equipment necessary to link users to each other and to service providers).

22. See Handelman, *supra* note 6, at 710 (suggesting one can easily scan photographic images to achieve "photo-realistic quality"); David B. Johnson, *Why the Possession of Computer-Generated Child Pornography can be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 314 (1994); Rimm, *supra* note 8, at 1864.

and graphic images through the Internet.²³ What does all this technological capability mean? How easy is it for adults or children to access pornography through computer networks?

B. Availability of Pornography on the Internet: What's Out There?

At some point in history, virtually every form of communication has been used to transmit messages pertaining to sex, and governments have attempted, and sometimes succeeded to regulate such uses.²⁴ Thus, it should not be too surprising that computer networks have recently become the center of legislative attention,²⁵ since they are the medium of the 1990s by which the growing market for sexually-oriented materials can satisfy its desires.²⁶ Although computer pornography has existed since the early 1980s, its availability has only become widespread in recent years due to the growth of BBSs.²⁷ BBS operators can scan (porno)graphic images onto their computer hard drives and transmit them to anyone with a computer and modem. In turn, the recipients can then download and display the images without much effort.²⁸ The recent proliferation of Internet pornography can be attributed to the fact that computer users can indulge their fantasies in the privacy of their own home.²⁹ It can also be attributed to the

23. Rimm, *supra* note 8, at 1864 (claiming that images obtained from private BBSs are much easier to view since they do not need to be encoded or decoded).

24. See, e.g., *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (upholding regulation of obscene commercial telephone messages, but striking down indecency regulation of the same); *FCC v. Pacifica*, 438 U.S. 726 (1978) (upholding regulations of indecent broadcast speech); *Miller v. California*, 413 U.S. 15 (1973) (affirming conviction of using the mail to transport obscene literature); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (holding obscene films not constitutionally protected); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (holding total ban on distribution of indecent speech through cable television unconstitutionally overbroad); Gerard Van der Leun, *Twilight Zone of the Id*, TIME, March 22, 1995, at 36.

25. See *infra* note 40 and accompanying text (describing legislative efforts to control access by minors to indecent messages).

26. See Kim, *supra* note 6, at 420 (citing Barry W. Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 HARV. C.R.-C.L. L. REV. 27, 30 (1986)); see also Ronald K.L. Collins & David M. Skover, *The Pornographic State*, 107 HARV. L. REV. 1374, 1382 (1994) (reporting that Americans spend nearly ten billion dollars annually on pornographic magazines, films, phone sex and videos) (citing U.S. DEP'T OF JUSTICE, BEYOND THE PORNOGRAPHY COMMISSION: THE FEDERAL RESPONSE 6 (1988)).

27. Kim, *supra* note 6, at 420; Handelman, *supra* note 7, at 709.

28. Rimm, *supra* note 8, at 1864. Furthermore, CD-ROM technology now makes it relatively simple to acquire large quantities of pornographic images at little cost. *Id.* at 1914.

29. Rimm, *supra* note 8, at 1852 (stating that computer users can now avoid the embarrassment of walking into an adult book store). *But see* Anne Wells Branscomb, *Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information*

ease with which users can download such images.³⁰

Although large commercial Internet service providers generally do not carry hard core pornographic materials,³¹ a research team at Carnegie Mellon University (CMU) recently discovered that there was a great deal of sexually explicit materials available elsewhere on the Internet.³² The CMU study found that approximately one-third of the most frequently visited Usenet newsgroups were identified as pornographic,³³ and that nearly eighty-five percent of all images posted on the Usenet were pornographic.³⁴ However, not all of the nearly 170

Superhighway Reveal a Threat to the Stability of Society?, 83 GEO. L.J. 1935, 1942 n.33 (1995) (suggesting that the notion of privacy on computer networks may be a fallacy because most accounts and downloading efforts are identifiable and can be disclosed).

30. Rimm, *supra* note 8, at 1852. Moreover, it has become easier to market to an ever-expanding audience because of the fear of AIDS and other sexually transmitted diseases. *Id.*; see Pamela A. Huelster, *Cybersex and Community Standards*, 73 B.U. L. REV. 865, 869, (1995) (estimating that the distribution of erotic materials through the Internet will be a "three- to five billion-dollar industry within five years").

31. See Rimm, *supra* note 8, at 1861. *But see* Meyer, *supra* note 7, at 1970-71 (claiming that CompuServe offers a library feature that includes nude women). Recently, CompuServe decided to block access to over 200 newsgroups relating to sex, where users could post messages, including text, graphics, and sound. *Germans, CompuServe disagree on Ban Details*, STAR TRIB. (Minneapolis), Jan. 3, 1996, at 6A. CompuServe's action was apparently prompted by German officials who threatened prosecution, although the prosecutors deny making explicit threats. *Id.* Nonetheless, because CompuServe could not effectively prevent its German users from accessing certain forums, it decided to block access to all of its 4 million subscribers. *Cyberporn, Limited Access Sparks Free-Speech Row*, STAR TRIB. (Minneapolis), Dec. 30, 1995, at 10A. Critics charged that CompuServe's response "opens the door to other national governments imposing their own restrictions. . . . [even if the content is not] sexually explicit." *Id.* (quoting Marc Rotenburg, executive director of the Electronic Privacy Information Center).

32. See generally Rimm, *supra* note 8 (surveying 917,410 pornographic images, descriptions, short stories and animations and their various locations on the Internet and discussing the CMU study of pornographic material on the Internet). *But see* Philip Elmer-Dewitt, *Fire Storm on the Computer Nets: A New Study of Cyberporn, Reported in a Time Cover Story, Sparks Controversy*, TIME, July 24, 1995, at 57 (criticizing CMU's study as exaggerating the extent of Internet porn because it confused "findings from private adult bulletin-board systems that require credit cards for payments (and are off limits to minors) with those from the public networks (which are not)").

33. Rimm, *supra* note 8, at 1870; see Faucette, *supra* note 13, at 1163 (noting that USA Today reported that, "monthly compilation of the most trafficked Usenet newsgroups . . . shows that three of the top 10 are sex-related: alt.sex.stories, alt.binaries.pictures.erotica, and alt.sex.").

34. Rimm, *supra* note 8, at 1914 (reporting that 71% of Usenet porn comes from commercial BBSs). However, the total Internet traffic associated with Usenet newsgroups containing pornographic imagery was only 2.5%. *Id.* at 1869. *But see* Elmer-Dewitt, *Fire Storm*, *supra* note 32, at 57 (claiming that porn files represent less than one-half of one percent of all messages posted on the Internet). Although the CMU study reveals that much of the pornography is pedophilia and bestiality, the researchers found nothing which cannot be purchased in specialty magazines or adult

newsgroups that relate to sex can be classified as pornographic.³⁵ There are newsgroups devoted to "safe sex, responsible sexual conduct, tolerance for homosexuality, racial tolerance, and equality between the sexes."³⁶ Moreover, merely accessing newsgroups containing pornographic images does not mean that these images will come roaring across the computer screen. Generally, accessing sexually explicit BBSs or discussion groups requires the user to "go past a password and a warning label."³⁷ As the CMU research team discovered, pornographic BBSs generally require the user to provide a real name, address, date of birth, password, and read a legal disclaimer. Furthermore, approximately one-half also require photocopies of a driver's license with proof of age before granting access.³⁸ More importantly, a user must take additional affirmative steps to download the unencoded images, use a separate application to decode the image, and use yet another program to view the image.³⁹ Thus, there is little chance that individuals will unexpectedly stumble across objectionable materials on their venture through the cyberworld.

However, Congress was not convinced of the adequacy of these safeguards when it recently passed the Communications Decency Act, making it a federal crime to knowingly transmit or make available obscene materials through the Internet.⁴⁰ Although this law is the

bookstores. See Rimm, *supra* note 9, at 1885; Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 40.

35. Meyer, *supra* note 7, at 1984-85.

36. Faucette, *supra* note 13, at 1163; see Goldman, *supra* note 6, at 1086-87 (stating that some discussion groups are devoted to sex in a therapeutic sense, and some may not be devoted to sex, but may still contain pornography); Meyer, *supra* note 7, at 1985 (reporting that there are newsgroups classified under sex which are devoted to "politics" and "news," and even a Christian discussion group about sex).

37. Meyer, *supra* note 7, at 1969 n.4 (quoting David R. Johnson, *Traveling in Cyberspace*, LEGAL TIMES, Apr. 3, 1995, at 26).

38. See Huelster, *supra* note 30, at 872-73 (stating that BBS services generally prescreen applicants and require them to sign subscription agreements); Elmer-Dewitt, *supra* note 34, at 40 (claiming that private adult BBSs are off limits to minors, who would "have to master some fairly daunting computer science before they can turn so-called binary files on the Usenet into high-resolution color pictures").

39. Faucette, *supra* note 13, at 1164.

40. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Act also prohibits the transmission of indecent messages to minors, and provides fines up to \$100,000 or two years imprisonment for violations of either the obscenity or indecency provisions. *Id.* Shortly after this bill was signed by President Clinton, the American Civil Liberties Union and 19 other groups asked a federal judge in Philadelphia to block the "indecency" provision, arguing that "it lacks definition and smacks of censorship." Gautam Naik, *Landmark Telecom Bill Becomes Law*, WALL ST. J., Feb. 9, 1996, at B3; see *ACLU v. Reno*, 1996 WL65464 (E.D. Pa. Feb. 15, 1996).

The Senate version of this bill had passed by a margin of 84 to 16 shortly after its sponsor, Nebraska Senator James Exon, exhibited at his desk a "blue book" containing

first congressional attempt to censor on-line speech, it merely adds to the federal arsenal in combating sexually explicit materials transmitted through various communicative media.⁴¹ To some, it may seem a mere continuation of the government's perceived paternalistic role in protecting society by ferreting out speech which does not conform to the sensibilities of the sensitive. Yet the government does, to some extent, possess the legitimate right to impose protective restrictions on speech, so long as those restrictions do not unduly inhibit the free flow of communication between consenting adults. Thus, a careful balance must be struck between individuals' right to free speech and the government's right to exercise its protective capacity.

II. THE UNITED STATES SUPREME COURT'S TREATMENT OF OBSCENITY

A. *In the Beginning*

Prior to the 1940s, it was merely assumed that obscenity received no First Amendment protection.⁴² A 1942 Supreme Court decision reflected this assumption when the Court stated, in dicta: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene.*"⁴³

Fifteen years later, the Supreme Court converted this assumption into law in *Roth v. United States*, when it held that First Amendment protection of free speech does not extend to obscenity.⁴⁴ In *Roth*, the Court stated that First Amendment protection was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁴⁵ In other words, it protects "ideas having even the slightest redeeming social importance."⁴⁶ However, because obscenity was considered "utterly without redeeming social importance," it fell outside the scope of First Amendment

some of the rawer images available on-line. Elmer-Dewitt, *supra* note 34, at 42.

41. See, e.g., 18 U.S.C. § 1461 (1988) (prohibiting the use of mails to distribute obscene materials); 18 U.S.C. § 1462 (a)-(b) (1988) (prohibiting the importation or transportation of obscene materials); 18 U.S.C. § 1464 (1988) (prohibiting obscene broadcasts); 18 U.S.C. § 1465 (1988) (prohibiting the importation or transportation of obscene materials for the purpose of sale or distribution); 18 U.S.C. § 2251-54 (West Supp. 1993) (prohibiting child pornography).

42. *Roth v. United States*, 354 U.S. 476, 481 (1957).

43. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (emphasis added).

44. *Roth*, 354 U.S. at 485.

45. *Id.* at 484.

46. *Id.* (finding full protection for unorthodox ideas, controversial ideas, and ideas hateful to the prevailing climate of opinion).

protection.⁴⁷

The *Roth* Court defined obscenity as “material which deals with sex in a manner appealing to prurient interest.”⁴⁸ Thus, the factual question to ask in identifying obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁴⁹ In 1966, a plurality of the Court elaborated on *Roth* and articulated a new three-part test for obscenity in *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts*:

[I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.⁵⁰

Since the prosecution was required to prove a negative beyond a reasonable doubt—that the material was utterly without redeeming social value—the third prong of *Memoirs* made it almost impossible to prosecute obscenity cases.⁵¹

B. Then There Was Miller

Recognizing the inadequacies of the *Memoirs* test, and rejecting the “utterly without redeeming social value” analysis, the Supreme Court

47. *Id.* at 484-85.

48. *Id.* at 487. The Court also stated that sex and obscenity are not synonymous. *Id.* Therefore, while not all pornography is necessarily obscenity, all obscenity must necessarily be pornographic.

49. *Id.* at 489. The Court expressly rejected the leading English case which held that obscenity is to be judged by the effect of a single passage upon a particularly susceptible person. *Id.* at 488-89 (citing *Regina v. Hicklin*, 3 L.R. 360 (Q.B. 1868)). Under the *Hicklin* test, adopted at one time by many American courts, the following works were held obscene: Henry Miller’s *Tropic of Cancer* and *Tropic of Capricorn*, *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951), *aff’d sub nom.*, *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953); Theodore Dreiser’s *An American Tragedy*, *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930); D. H. Lawrence’s *Lady Chatterly’s Lover*, *Commonwealth v. Delacy*, 171 N.E. 455 (Mass. 1930); see P. Heath Brockwell, Comment, *Grappling With Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 131-32 (1993) (discussing the *Hicklin* case); Mary C. Mertz Parnell, *Applying Community Standards to International Direct Broadcasting Satellites: Can the United States Know Obscenity Without Seeing It?*, 17 SUFFOLK TRANSNAT’L L. REV. 473, 487-88 n.62 (1994) (discussing differing applications of obscenity standards between the United States, Japan, and West Germany).

50. *“John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts*, 383 U.S. 413, 418 (1966).

51. See *Miller v. California*, 413 U.S. 15, 22, 24-25 (1973); E. Edward Bruce, *Prostitution and Obscenity: A Comment Upon the Attorney General’s Report on Pornography*, 1987 DUKE L.J. 123, 126 (1987).

once again sought to formulate a more objective definition of obscenity in *Miller v. California*.⁵² The *Miller* test incorporated a slightly altered three-factor test:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁵³

The *Miller* Court expressly limited obscenity to patently offensive "hard-core" pornography,⁵⁴ and held that the determination of the first two prongs (prurient interest and patent offensiveness) are made by a jury applying contemporary community standards, not a national standard.⁵⁵ However, the Court later held in *Smith v. United States*,⁵⁶ that the third prong (serious value) must be determined by applying a

52. *Miller*, 413 U.S. at 15. The *Miller* decision was the first time since *Roth* that a majority of the Court had agreed on a test for obscenity. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.60, at 318 (1992).

53. *Miller*, 413 U.S. at 24. The Court later held that material which provokes only normal, healthy sexual desires could not be considered obscene; rather, the material must appeal to a "shameful or morbid interest in nudity, sex, or excretion." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497 (1985) (quoting *Roth*, 354 U.S. at 487 n.20).

54. *Miller*, 413 U.S. at 27. While the Court did not define "hard-core" pornography, it recited two examples of sexually explicit materials that a State could define for regulation: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and, (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

The Court in *New York v. Ferber*, 458 U.S. 747 (1982), held that child pornography, even if not legally obscene, may be constitutionally prohibited. In granting states greater leeway in regulating child pornography, the Court identified five compelling interests justifying its suppression: (1) "safeguarding the physical and psychological well-being of a minor," *id.* at 756-57; (2) the creation and distribution of child pornography is based upon the sexual abuse of children, *id.* at 759; (3) the ability to make money in the distribution of child pornography provides individuals with the incentive to partake in illegal activity, *id.* at 761; (4) the value of child pornography is "exceedingly modest, if not de minimis," *id.* at 762; and (5) child pornography does not fall within the protections of the First Amendment, *id.* at 763.

55. *Miller*, 413 U.S. at 37. While holding that a national community standard applied, the Court held that a material's appeal to prurient sexual interest is to be judged according to its impact on the average person, rather than on a particularly sensitive one. *Id.* at 33. Furthermore, in two companion cases to *Miller*, the Court held that the obscenity standards applicable to state legislation are equally applicable to federal legislation, and that written words, as well as pictures, could also be considered obscene. See *Kaplan v. California*, 413 U.S. 115, 119-20 (1973); *United States v. 12,200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 129-30 (1973).

56. 431 U.S. 291, 301 (1977).

national standard.⁵⁷

The *Miller* Court required the use of "contemporary community standards" to ensure that allegedly obscene material is "judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one."⁵⁸ In *Jenkins v. Georgia*, the Court went one step further and held that, despite the jury's role in making determinations of obscenity, the reviewing court must undertake an independent review of the facts.⁵⁹ In *Jenkins*, a jury found the defendant guilty of distributing obscene materials when he showed the Hollywood film *Carnal Knowledge* in a Georgia movie theater.⁶⁰ The Court thought "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'"⁶¹ While independent appellate review was aimed at preventing convictions by particularly sensitive or insensitive juries, Justice Brennan proclaimed that "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."⁶²

C. Private Possession Versus Public Distribution

The Supreme Court, in *Stanley v. Georgia*, held that while the government may regulate the public distribution of obscenity, it could

57. The question of whether the same material, taken as a whole, lacks serious literary, artistic, political, or scientific value was later required to be determined by applying a "reasonable person" standard. See *Pope v. Illinois*, 481 U.S. 497, 501 n.3 (1987) (stating that "the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met.").

58. *Miller*, 413 U.S. at 33.

59. *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974). Although independent appellate review is deemed to be an additional safeguard for free speech, consider the following appellate judge's description of Henry Miller's *Tropic of Cancer*:

"Cancer" is not a book. It is a cesspool, an open sewer, a pit of putrefaction, a slimy gathering of all that is rotten in the debris of human depravity. And the center of all this waste and stench, besmearing himself with its foulest defilement, splashes, leaps, cavorts and wallows a bifurcated specimen that responds to the name of Henry Miller.

Commonwealth v. Robin, 218 A.2d 546, 556 (Pa. 1966).

60. *Jenkins*, 418 U.S. at 154.

61. *Id.* at 160.

62. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting). Justice Brennan's reasoning follows from the fact that speech is presumed to be legally non-obscene until the trier of fact has so concluded, and that the appellate courts must conduct an independent review of the jury's or trial court's determination. See *Fort Wayne Books, Inc. v. Kentucky*, 489 U.S. 46, 62 (1989); *Jenkins*, 418 U.S. at 160; *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); *Miller*, 413 U.S. at 25.

not regulate the same in the privacy of one's home.⁶³ The Court proclaimed: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."⁶⁴ Although the *Stanley* Court declared that the Constitution forbids legislation aimed at controlling an individual's private thoughts,⁶⁵ it has since been unwilling to extend this protection beyond the confines of the home.⁶⁶ Thus, while "the private possession of obscene materials in the home is protected activity, virtually any process that leads to such possession may be declared illegal."⁶⁷

III. COMMUNITY STANDARDS: AN ARGUMENT FOR A NATIONAL OBSCENITY STANDARD

In *Miller v. California*, the Court held that the first two prongs of the obscenity definition—what appeals to the prurient interest and what is patently offensive—are determined by applying community standards, not national standards.⁶⁸ However, the Court has since held that *Miller* did not mandate use of a national standard; instead, the trial court may instruct the jury to apply a "community standard" without specifying which community.⁶⁹ Thus, a juror may be instructed to draw on his knowledge of "the views of the average person in the

63. *Stanley v. Georgia*, 394 U.S. 557 (1969).

64. *Id.* at 565; see *Ginsberg v. New York*, 390 U.S. 629, 654 (1968) (Douglas, J., dissenting) (arguing that "Big Brother can no more say what a person shall listen to or read than he can say what shall be published."). However, the government may constitutionally proscribe the private possession and viewing of child pornography which is not legally obscene. *Osborne v. Ohio*, 495 U.S. 103 (1990); see *supra* note 54 (explaining the rationale behind the Court's separate treatment of child pornography).

65. *Stanley*, 394 U.S. at 566.

66. See, e.g., *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (upholding FCC regulation of obscenity transmitted over the telephone); *United States v. Orito*, 413 U.S. 139 (1973) (rejecting the right to receive, transport or distribute obscene materials in interstate commerce); *United States v. 12,200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 128 (1973) (upholding the United States' right to prohibit importation of obscene materials, even if intended solely for private or personal use and possession); *United States v. Reidel*, 402 U.S. 351 (1971) (denying the right to receive obscene materials through the mail); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (holding that *Stanley* does not give rise to a right to sell or give obscene materials to others).

67. *ROTUNDA & NOWAK, supra* note 52, § 20.61, at 322-23. In theory, it may still be possible to prosecute individuals who privately possessed obscenity, because they would have had to violate an obscenity transportation law in order to get the material into their home; that is, unless they actually created the material inside their home.

68. *Miller v. California*, 413 U.S. 15, 37 (1973).

69. *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Hamling v. United States*, 418 U.S. 87, 104-05 (1974); see *Smith v. United States*, 431 U.S. 291, 303 (1977) (stating that the question of community standards "is not one that can be defined legislatively").

community or vicinage from which he comes."⁷⁰

The question of whether the community standard should reflect a national, state, or a more localized standard has been the source of much debate. The Supreme Court has expressly rejected a constitutional requirement of a national standard for obscenity, arguing that such a standard is unprovable, and it would be unreasonable to expect courts to enunciate one.⁷¹ Furthermore, the *Miller* Court asserted that a national standard would require people in one part of the country to accept offensive depictions of sexual conduct found tolerable in another part of the country.⁷²

The application of local or state community standards has both constitutional and practical drawbacks, especially when applied to sexually explicit materials on the Internet. First, any local definition of a community should not be employed to delineate "the area of expression that is protected by the Federal Constitution."⁷³ In *Jacobellis v. Ohio*, the Court stated that it "has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines.'"⁷⁴ Second, applying either state or local standards has the practical effect of suppressing speech which the government cannot constitutionally suppress directly.⁷⁵ Since the varied standards existing in each locale are impossible to discern, disseminators of allegedly obscene materials may legitimately fear the risk of being criminally prosecuted in any remote communi-

70. *Hamling*, 418 U.S. at 104.

71. *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting). In *Miller v. California*, the Court also reasoned:

[O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. . . . To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.

413 U.S. 15, 30 (1973).

72. *Miller*, 413 U.S. at 32 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."); see Rimm, *supra* note 8, at 1897 n.94. Rimm alleges that the heart of *Miller* was to enable communities "desiring to exclude marginally valuable sexual expression [to] be able to do so without regard to the status of similar expression in other communities." *Id.* (citing *Miller*, 413 U.S. at 30-34).

73. *Jacobellis*, 378 U.S. at 193 (opinion of Brennan, J., joined by Goldberg, J.).

74. *Id.* at 194-95 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

75. *Hamling v. United States*, 418 U.S. 87, 144 (1974) (Brennan, J., dissenting). *Contra Miller v. California*, 413 U.S. 15, 32 n.13 (1973) (stating that nationwide standards will have the same chilling effect on speech in communities whose tolerance of the materials is greater than the national average).

ty.⁷⁶ Because such fear may inevitably force self-censorship, it could restrict the public's access to constitutionally protected materials.⁷⁷ Thus, communities in which the material might otherwise be permitted would be denied their right of access to those materials.⁷⁸

The third criticism of state or local standards is that such standards are just as hypothetical and unascertainable as a national standard.⁷⁹ Justice Stevens, in his dissenting opinion in *Smith v. United States*, asserted that the most compelling reason for rejecting a national standard for obscenity applies equally to the use of local or state standards.⁸⁰ He argued that the "diversity within the Nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities in which litigation of this kind is prosecuted."⁸¹ Thus, whether certain speech is offensive to state or local community standards is not a question that could be expected to produce a fair and consistent result.⁸²

The fourth, and perhaps most compelling, reason to adopt a national obscenity standard, at least in the context of the Internet, is illustrated by a recent criminal prosecution for distributing pornographic materials over a computer network. In *United States v. Thomas*, a couple who operated an adult bulletin board service from California

76. *Hamling*, 418 U.S. at 143-44 (Brennan, J., dissenting). In *Ginzburg v. United States*, Justice Black argued:

[T]he guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon . . . particular individuals and the place where the trial is held. And one must remember that the Federal Government has the power to try a man for mailing obscene matter in a court 3,000 miles from his home.

383 U.S. 463, 480 (1966) (Black, J., dissenting).

77. See *Smith v. California*, 361 U.S. 147, 154 (1959).

78. But see *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)) (holding that First Amendment protection of free speech extends to a person's right to receive "information and ideas, regardless of their social worth.").

79. *Smith v. United States*, 431 U.S. 291, 314 (1977) (Stevens, J., dissenting).

80. *Id.* at 313.

81. *Id.* at 313-14. Justice Stevens further argued that the assumption in *Miller* that jurors could more easily "draw on standards of their community" was misconceived. *Id.* at 314 n.10. He explained:

[This] assumption can only relate to isolated communities where jurors are well enough acquainted with members of their community to know their private tastes and values. The assumption does not apply to most segments of our diverse, mobile, metropolitan society. For surely, the standard for a metropolitan area is just as "hypothetical and unascertainable" as any national standard.

Id.

82. *Id.* at 315. Justice Stevens also noted that, since the record never discloses what obscenity standard the jury actually applies, their decisions are virtually unreviewable. *Id.* at 315-16.

were convicted on obscenity charges in Memphis, Tennessee.⁸³

Operating from a district in San Francisco, where essentially "anything goes,"⁸⁴ Robert and Carleen Thomas offered their services to paying customers only.⁸⁵ The government set up a sting operation and downloaded many of the materials from a computer in Memphis, Tennessee, then extradited the couple from California to stand trial on obscenity charges in Memphis. At trial, the jury was instructed to apply the standards of Memphis in determining whether the material from California was obscene. Robert and Carleen Thomas were convicted on ten counts of interstate transmission of obscene images, and were sentenced to thirty-seven and thirty months in prison respectively.⁸⁶ On appeal, the Thomases, and amicus curiae,⁸⁷ argued that "the computer technology requires a new definition of community, i.e., one that is based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial."⁸⁸ However, the Sixth Circuit Court of Appeals rejected this claim, and affirmed the Thomases' conviction.⁸⁹

Although the *Thomas* court correctly followed existing law regarding community standards, it is more appropriate to apply a national standard for Internet communications.⁹⁰ Applying local or state

83. *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996).

84. Symposium, *Panel II: Censorship On the Internet: Do Obscene or Pornographic Materials Have A Protected Status?*, 5 FORD. INTELL. PROP., MEDIA & ENT. L.J. 279, 292 (1995); cf. Huelster, *supra* note 30, at 866 (claiming that San Jose law enforcement officials had previously determined that the Thomases' materials on their bulletin boards did not violate the obscenity standards of San Jose) (citing David J. Loundy, *Whose Standards? Whose Community?*, CHI. DAILY L. BULL., Aug. 1, 1994, at 5).

85. *Thomas*, 74 F.3d at 705; Donna Gallagher, *Free Speech on the Line: Modern Technology and the First Amendment*, 3 COM.LAW CONSPICUOUS 197, 202 (1995).

86. *Thomas*, 74 F.3d at 706.

87. *Id.* at 711. The American Civil Liberties Union, the Interactive Services Association, the Society for Electronic Access, and The Electronic Frontier Foundation all submitted briefs on behalf of the Thomases. *Id.*

88. *Id.*

89. *Id.* at 716.

90. See Dennis W. Chiu, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 211-17 (1995) (arguing that the needs of the local community should be weighed against the threat to individual liberties, which provides more notice as to what conduct is prohibited); Handelman, *supra* note 7, at 710, 714-731 (arguing that the differences between the Internet and the "tangible" world render application of *Miller's* obscenity standard inappropriate to Internet communications); John V. Edwards, Note, *Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia?*, a National Obscenity Standard, and Other Miscellany, 33 WM. & MARY L. REV. 949 (1992) (discussing obscenity laws with regard to direct satellite broadcasts); Randolph Stuart Sergeant, Note, *Sex, Candor, and Computers: Obscenity and Indecency on the Electronic Frontier*, 10 J.L. & POL. 703, 730 (1994) (stating that it would be "impossible . . . to determine the community standards in every town in America"). At least one commentator has argued in favor

standards encourages prosecutors to forum shop for a jurisdiction from which to download Internet material, logically choosing the most conservative districts to ensure a conviction. However, the practical effect of this strategy is that every computer user must conform their speech to the most conservative jurisdiction with a telephone line. Thus, the so-called "Bible-belt" community standard will be engrafted upon the entire nation, and essentially become the national standard.⁹¹

In *Sable Communications of California, Inc. v. FCC*, the Supreme Court addressed a similar issue in the context of obscene messages sent over the telephone.⁹² The Court rejected Sable's claim that a local standard "places message senders in a 'double-bind' by compelling them to tailor their messages to the least tolerant community."⁹³ Though Sable could be subjected to varying community standards in which it transmits its messages, that alone was not grounds to apply a national standard because Sable was free to tailor its messages selectively to the communities it served.⁹⁴ Thus, the Court was not sympathetic to national disseminators who "may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls."⁹⁵

The *Thomas* court adopted Sable's reasoning and stated that, like Sable, the Thomases were free to selectively tailor their messages to the communities they chose to serve.⁹⁶ Moreover, the court in *Thomas* focused on the fact that the Thomases "had in place methods to limit user access in jurisdictions where the risk of finding obscenity was greater than that in California. They knew they had a member in Memphis; the member's address and local phone number were provided on his application form."⁹⁷

However, the court limited its holding to the facts of the case, and was able to avoid deciding the constitutional issue of whether a new

of a "virtual community" standard. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1654 (1995); Gallagher, *supra* note 85, at 202; Kim, *supra* note 6, at 430. However, there will likely come a time when enough of our nation is connected to the Internet that the distinction between the "virtual community" and the real-world communities will vanish.

91. See Huelster, *supra* note 30, at 865-66; Peter D. Kennedy & James A. Hemphill, *Publishing on the Internet: Pitfalls and Protections*, 4 TEX. INTELL. PROP. L.J. 33, 35 (1995).

92. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); see *infra* notes 134-41 and accompanying text describing Sable's holding with respect to indecency regulations.

93. *Sable*, 492 U.S. at 124.

94. *Id.* at 125.

95. *Id.* (emphasis added).

96. *United States v. Thomas*, 74 F.3d 701, 712 (6th Cir. 1996).

97. *Id.* at 711.

definition of "community" was necessary "for use on obscenity prosecutions involving electronic bulletin boards."⁹⁸ Therefore, bulletin board operators will have to wait for another court, working with different facts, to determine the fate of that issue.

However, *Sable* does give us some insight into what the future holds for "community standards" on the Internet. While the *Sable* Court held that imposing *some* costs on national disseminators of sexually explicit telephone messages does not violate the First Amendment, it did not determine what level of costs could constitutionally be imposed.⁹⁹ In addition, the Court did not consider whether the same analysis might apply if the technology to tailor messages to selective communities was simply unavailable.¹⁰⁰

Sable presupposes that, although there are some costs involved, the "dial-a-porn" service provider does have the ability to tailor its messages to the communities it chooses to serve. In the context of the Internet, such reasoning should apply, if at all, only to those service providers that affirmatively market sexually-related materials to a national market.¹⁰¹ By affirmatively marketing nationally, these distributors arguably accept the risk of violating obscenity laws in locales that may deem the materials "patently offensive." The same should not be true for access providers or network operators, who could not feasibly screen each of the millions of communication transactions that occur every day, let alone tailor such messages to the appropriate communities.¹⁰²

98. *Id.* at 712 (stating that one of the cardinal rules of the federal courts is "never reach constitutional questions not squarely presented by the facts of a case").

99. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 125 (1989) (emphasis added).

100. It is unclear whether the technology to selectively tailor messages to particular regions is yet available. See *infra* notes 101-03. However, if the technology can be developed and employed at a minimum expense, then *Sable* would arguably foreclose the likelihood of establishing a national standard for national distributors of sexually-explicit materials through the Internet. The question, as in all balancing tests, should be whether the technology is cheap enough so as not to unduly inhibit free speech, by forcing distributors out of business.

101. Compare *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (noting that the Thomases easily could, and actually did, know where their subscribers lived) with *Kim*, *supra* note 6, at 425 (claiming that even BBS operators "cannot completely block calls from any given community") and *Chiu*, *supra* note 90, at 208 (comparing a BBS to a regular phone system to illustrate the difficulty of preventing calls from a different jurisdiction) and *Huelster*, *supra* note 30, at 870 (arguing that sysops have no control over the destination of the materials) and *Sargent*, *supra* note 90, at 731 (finding a weakness in the *Sable* argument because of its impossible application to large information networks).

102. See *Huelster*, *supra* note 30, at 868 (stating that sysops can delete individual messages but not every transmission). Another problem arises from the fact that users of BBSs, which require passwords, can access the BBS from any computer in the world.

Furthermore, applying local or state standards to sexual materials on the Internet, which has no meaningful or geographical boundaries,¹⁰³ ignores the policy considerations underlying the *Miller* test for obscenity. The foundation for the *Miller* test was the assumption that certain sexually explicit materials were offensive to particular communities, and that these communities should be able to insulate themselves from such materials.¹⁰⁴ However, the manner in which Internet communications occur erodes this rationale for applying anything less than a national standard.¹⁰⁵

One commentator contends that application of a local standard to Cyberspace transactions fails "to recognize the distinction between cyberspace transaction and their physical analogues."¹⁰⁶ Unlike obscenity passing through a community via the mail, which has a negligible impact on that community, electronic communications do not have a similar impact on the community through which they pass.¹⁰⁷ Until they reach the user's computer, the communications are merely a series of electrical impulses requiring computer software to decode them.¹⁰⁸ Furthermore, since both parties to such communications are usually located in their own homes, *Stanley* would suggest that the government cannot proscribe this conduct.¹⁰⁹

Thus, even if the BBS uses an application form to ensure that the subscriber lives in a region where the material is acceptable, the subscriber could use the password to download the same information from a location where the material is considered obscene.

103. Chiu, *supra* note 90, at 209 (determining that local community standards are no longer viable in the advent of the information superhighway); Kennedy, *supra* note 91, at 35 (stating that cyberspace transcends traditional geographical boundaries); Kim, *supra* note 6, at 430 (finding assumptions of geographic boundaries to be erroneous).

104. See Rimm, *supra* note 8, at 1896 (assessing material according to the standards of the community where it is purchased or received).

105. See Handelman, *supra* note 6, at 731 (asserting that, unlike newsstands, book stores and movie theaters, material accessed through the Internet is not within the community's view).

106. Byassee, *supra* note 12, at 209; cf. Symposium, *supra* note 84, at 292 (arguing that the district court in *Thomas* looked at the "wrong community or the wrong geographical region").

107. Chiu, *supra* note 90, at 205 (stating that discreet computer transmissions are not exposed to anyone except the computer users).

108. Byassee, *supra* note 12, at 209-10 (asserting that, at least with respect to adult services that can only be accessed through affirmative measures conducted in the privacy of one's home, there is no danger that the surrounding community will be offended by this secret or private viewing). However, where there truly does exist a genuine impact beyond the cyber-community, as in the case where local children are used as models for on-line pornography, then a local community standard may be appropriate. See Branscomb, *supra* note 90, at 1653; Branscomb, *supra* note 29, at 1949.

109. *Stanley v. Georgia*, 394 U.S. 557 (1969). But cf. *United States v. Orito*, 413 U.S. 139 (1973) (holding that the federal government could regulate interstate transportation of obscenity on the basis of a mere risk of exposure to juveniles or the public).

As an illustration of the dilemma imposed upon Internet providers of sexually-oriented materials, compare the *Thomas* case¹¹⁰ with the same exact transaction conducted in-person rather than through a computer network. Assume that a Tennessee resident enters an adult book store in California and purchases materials that are not obscene in California, then sends them back to his home in Tennessee where they are considered obscene. At the time of purchase, no crime has been committed; however, the purchaser's transportation of the materials to Tennessee might render the purchaser criminally liable.¹¹¹

If the same transaction occurs solely through the Internet, then the same material winds up in Tennessee. As far as the seller is concerned, there is little or no significant legal reason to distinguish between these two transactions. In both instances, the seller in California made available the materials, and the purchaser was solely responsible for any subsequent dissemination and violation of Tennessee's community standards.¹¹² Thus, while the Thomases would have committed no crime had the purchaser physically traveled to California and picked up the materials, they could be, and actually were, prosecuted for essentially the same transaction occurring in Cyberspace. It is this inconsistency that challenges the rationale behind the Court's refusal to recognize that our federal Constitution should not be compromised merely because various communities want to control the content of speech passing through their boundaries—without regard to whether the communication has any significant impact outside the home of transacting parties.

In summary, anything less than a national standard for judging obscenity disregards the fact that our Constitution knows no state boundaries,¹¹³ and would have the practical effect of suppressing

However, the *Orito* Court failed to consider that the same risk is also posed by private possession of obscenity, which it held protected in *Stanley*. Furthermore, *Orito* was premised on the notion that obscenity received no First Amendment protection; thus, the government prevailed on a mere showing of "rational basis." *Id.* at 143-44; *see also infra* notes 203-05 and accompanying text (suggesting that obscenity should be protected speech and then proscribed upon a finding of a compelling governmental interest).

110. *See supra* notes 83-89 and accompanying text.

111. *See* 18 U.S.C. § 1462 (1995) (prohibiting the interstate transportation of obscene materials); *United States v. 12,200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 128 (1973) (holding that even materials which are intended solely for private use can be prohibited from being transported interstate).

112. *See Kim, supra* note 6, at 434; *cf. Huelster, supra* note 30, at 886 (suggesting an approach that would place the liability on the user, since the materials would not have entered the community "but for the user requesting the transmission").

113. *See supra* notes 70-71 and accompanying text.

speech that could not be directly suppressed.¹¹⁴ Furthermore, in the context of the Internet, a local standard encourages prosecutors to forum shop for conservative districts, which could allow one community's strict standards to become the standard for the entire nation.¹¹⁵ Lastly, applying local standards to the Internet does little to further the fundamental policy consideration of *Miller*: that communities should be able to insulate themselves from exposure to objectionable materials.¹¹⁶

IV. INDECENCY ON THE INTERNET

The Supreme Court has drawn a distinction between speech which is legally obscene under *Miller*,¹¹⁷ and indecent speech.¹¹⁸ While government needs no justification for regulating obscene speech,¹¹⁹ the Court applies a strict scrutiny standard to the permissible scope of governmental regulations of indecent speech.¹²⁰ In short, the government may regulate indecent speech in order to promote a compelling government interest, but "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."¹²¹ However, when applying this standard to the various forms of communicative technology, the Court has recognized that the different characteristics of each medium "justify differences in First Amendment standards applied to them."¹²²

In *FCC v. Pacifica Foundation*, the Court upheld the exercise of the FCC's authority to regulate the broadcast of indecent speech.¹²³ The

114. See *supra* note 72 and accompanying text.

115. See *supra* notes 90-91 and accompanying text.

116. See *supra* note 104 and accompanying text.

117. See *supra* note 54 and accompanying text.

118. *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978). Indecent speech has been defined as that which does not conform to accepted standards of morality. *Id.*

119. The limited exception is that obscene speech is protected in the privacy of one's home. See *supra* notes 63-66 and accompanying text.

120. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

121. *Id.* at 126 (quoting *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980)). However, if the law sweeps into protected areas of speech, it is unconstitutionally overbroad. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

122. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969); see also *Pacifica*, 438 U.S. at 744 (stating that "indecenty is largely a function of context—it cannot be adequately judged in the abstract"); *Message*, *supra* note 5, at 1063 (arguing that the similarities between technological characteristics of the different media "should not be the crucial factor in determining the protection a message receives under the First Amendment").

123. *Pacifica*, 438 U.S. at 726. The FCC's determination arose from a daytime broadcast of satiric humorist George Carlin's "Filthy Words" monologue which listed and repeated words such as "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits."

Court based its holding on two compelling governmental interests: (1) the pervasive broadcast signals intrude into the privacy of one's home; and (2) the protection of children, as broadcasting is "uniquely accessible to children, even those too young to read."¹²⁴ The Court explained that the pervasively intrusive nature of broadcast speech renders impossible any prior warnings of offensive programming content; thus, an unwilling listener could not avoid the offense until it is too late.¹²⁵ The Court also noted that broadcast communication is uniquely accessible to children, and relied on its previous holding that "the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household justified the regulation of otherwise protected expression."¹²⁶ However, the Court was conscious of not reducing the adult population to hearing "only what is fit for children,"¹²⁷ and expressly emphasized the narrowness of its holding.¹²⁸

Lower federal courts have refused to apply the *Pacifica* holding to regulations of indecent cable television programming.¹²⁹ In *Cruz v.*

Id. at 751-55 (Appendix to the Opinion of the Court).

124. *Id.* at 748 (stating that, in the privacy of one's home, the right to be left alone "plainly outweighs the First Amendment rights of an intruder") (citing *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970)).

125. *Id.* at 748-49 (asserting that the argument that one may avoid "further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow").

126. *Id.* at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)) (internal quotations omitted). The Court also distinguished its previous holding in *Cohen v. California*, 403 U.S. 15 (1971), where a man wore a jacket reading "Fuck the Draft" into a California courthouse. The Court recognized that, outside the home, the balance between an offensive speaker and the unwilling listener may tip in favor of the speaker, but government may prohibit certain intrusions into the privacy of the home. *Id.* at 749 n.27. Furthermore, "[a]lthough Cohen's written message might have been incomprehensible to a first grader, *Pacifica's* broadcast could have enlarged a child's vocabulary in an instant." *Id.* at 749.

127. *Id.* at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

128. *Id.* at 750. The narrowness of *Pacifica's* holding is supported by the Supreme Court's decision in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), in which the Court struck down a federal statute prohibiting the unsolicited mailings of contraceptive advertisements. The Court held that the government may not "prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." *Id.* at 72 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980)). Although the Court acknowledged that particular recipients of objectionable materials may be offended, they could "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 72 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). To the Court, the burden of having to throw away objectionable materials was acceptable when compared to the First Amendment issues at stake. *Id.*

129. See, e.g., *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom.*, *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television v. Roy*

Ferre, the Eleventh Circuit Court of Appeals held that the different characteristics of cable television and broadcasting justify different treatment of the two when determining the permissible scope of the government's regulation of indecent speech.¹³⁰ Unlike broadcasting, cable television is not an uninvited intrusion into individual privacy because subscribers must take affirmative steps to bring it into the home and to acquire additional programming, such as Home Box Office (HBO).¹³¹ Moreover, the court concluded that the government's interest in protecting children could be adequately safeguarded through parental control devices such as a "lockbox" or "parental key."¹³² These devices, which enable parents to exert control over materials accessed by their children, are further supplemented by the cable company's guides that give prior warnings of programming containing objectionable materials.¹³³ In short, the court concluded that the government had failed to justify a total ban on cable television as the least intrusive means of furthering the two compelling interests of *Pacifica*: invasion of privacy and protection of children.

The Supreme Court also had occasion to pass upon the constitutionality of "indecentcy" regulations in the context of telephone communications, in *Sable Communications of California, Inc. v. FCC*.¹³⁴ The *Sable* Court affirmed the district court's injunction against enforcement of section 223(b) of the Communications Act of 1934,¹³⁵ which banned indecent interstate telephone communications commonly known as

City, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

130. *Cruz*, 755 F.2d at 1420; see *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456-57 (1994) (holding that the relaxed standard of scrutiny of broadcast was not applicable to regulations of cable television because of the fundamental differences between these two types of media); see also Angelyn M. Wright, *Indecent Exposure on the Information Superhighway: Regulating Pornography on Integrated Broadband Telecommunications Networks*, 11 GA. ST. U. L. REV. 465, 479 n.97 (comparing the important characteristics of cable television and broadcasting) (citing *Community Television*, 555 F. Supp. at 1167)).

131. *Cruz*, 755 F.2d at 1420. Furthermore, if the subscriber is dissatisfied with the cable service, he may cancel it at any time. *Id.*

132. *Id.* The court also noted that parental control over cable television programming greatly exceeds their ability to control broadcasting, for "[a]gain, parents must decide whether to allow Cablevision into the home." *Id.*

133. *Id.*; see *Community Television v. Wilkinson*, 611 F. Supp. 1099, 1114 (D. Utah 1985) (rejecting the argument that the state could step in where the parents are indifferent to or have neglected their duty to limit children's access to indecent materials); cf. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (stating that the "prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children").

134. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

135. 47 U.S.C. § 223(b) (1988).

"dial-a-porn."¹³⁶ The Court conceded that the government had demonstrated a compelling interest in protecting children and unwilling listeners from exposure to indecent sexual messages; however, it held that section 223(b) was not narrowly drawn to achieve these purposes.¹³⁷ The Court distinguished *Pacifica* on the basis that the "dial-it medium requires the listener to take affirmative steps to receive the communication."¹³⁸ Thus, unlike the "captive audience" of radio broadcast, an individual who places and pays for the telephone call is not an unwilling listener, and can avoid unwanted exposure to the message.¹³⁹ Moreover, the Court concluded that the FCC's credit card, access code and scrambling rules were effective solutions to serve the government's interest in protecting children.¹⁴⁰ Therefore, the total ban on such communications was held unconstitutional, for it was not the least restrictive means.¹⁴¹

The general principle that emerges from *Pacifica*, *Sable*, and their progeny is that where individuals have sufficient control over the dissemination of objectionable materials, the government may not step in and decide what individuals may listen to, view or read.¹⁴² Of course, the degree of control over content depends on the medium carrying the message. In light of the various media, the Court has effectively created a "spectrum of control" for the electronic media.¹⁴³ At one end of the spectrum is broadcasting, which comes into

136. *Sable*, 492 U.S. at 115-16.

137. *Id.* at 119. The Court held that the state's interest in protecting the physical and psychological well-being of children extends even to shielding them from materials which would not be deemed obscene under adult standards. *Id.* at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

138. *Id.* at 127-28.

139. *Id.* at 128.

140. *Id.*

141. *Id.* at 130-31. The federal parties insisted that the FCC rules cited by the Court were not effective because "enterprising youngsters could and would evade the rules and gain access to communications from which they should be shielded." *Id.* at 128. However, the Court rejected this argument, noting that there was no evidence in the record to substantiate this claim, since the FCC's rules had yet to be tested over time. *Id.* at 128-29. Therefore, the Court left open the possibility that, in the future, a total ban might be constitutional.

142. *See Message*, *supra* note 5, at 1077. The obvious corollary to this principle is that the less control the user has, the more room for government intervention. *Id.* at 1080. *But cf. supra* note 66 (discussing instances in which the Court has permitted the government to regulate obscenity outside the home despite the fact that in doing so, it has taken on a paternalistic role of making individuals' decisions for them).

143. *Message*, *supra* note 5, at 1080; Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 *FORDHAM L. REV.* 1147, 1153-54 (1993).

the home without invitation,¹⁴⁴ and whose audience (which often includes children) cannot be effectively forewarned. Somewhere in the middle is cable television, which can only be accessed by affirmative steps and with awareness of programming content. At the opposite end of the spectrum is the telephone, whose users must take deliberate steps to tap into services such as "dial-a-porn."

Where does the Internet fit into all of this? Could the government argue that a total ban on indecency over the Internet is the only effective means of furthering the interests of protecting children and unwilling users?¹⁴⁵ The answer depends on the amount of control users possess over content assimilation. One commentator suggests that while "BBSs do not fit neatly into any traditional category of media, BBSs are more likely to fall towards the 'least intrusive' end of the media spectrum."¹⁴⁶ Like cable and "dial-a-porn," BBS users must take affirmative steps to access such services; hence, they can hardly complain about any uninvited intrusions of privacy.¹⁴⁷

Apart from the "invitation" issue, the ultimate determination still remains: can users adequately protect themselves and their children from objectionable materials?¹⁴⁸ Critics have argued that children's

144. *Contra* Cate, *supra* note 8, at 41-42 (challenging the notion that broadcast is an uninvited intrusion).

145. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133-34 (1996) (making it a federal crime to produce or make available an indecent communication to a minor, punishable by a fine up to \$100,000 or imprisonment of up to two years).

146. Kim, *supra* note 6, at 437; see Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 412 (1992).

147. See Gallagher, *supra* note 85, at 205; Eric C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, 238-39 (1987); Miller, *supra* note 155, at 1192; see also Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1632 (1995) (contending that user control in the context of the Internet involves more than the privacy issue; it also entails two other important attributes: the ability to identify the content of the transmission and the ability to screen out objectionable content).

148. Even the issue of invitation, in the context of the Internet, is suspect. Unlike broadcasting, "dial-a-porn" and cable television users invite these media forms into their homes, arguably with an "expectation" or general awareness of their content. Although a computer user who affirmatively accesses a BBS known to contain particularly objectionable materials may be truly "inviting" that BBS into his or her home, an Internet user in general may not have the same expectation of content. Thus, the general Internet user may be more likened to the "captive" broadcast listener in the sense that the only way to avoid exposure to indecent speech would be to refrain from connecting into the Internet in the first place. That is a result that the Court may be unwilling to accept. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stating that the broadcast audience is captive because "prior warnings cannot completely protect the listener or viewer from *unexpected* program content") (emphasis added). It remains open to debate whether a user of the Internet's general services "invites" this technology

access to computer networks is too difficult to control because today's parents are not computer literate enough to effectively exercise parental control.¹⁴⁹ However, there are "less restrictive" alternatives that restore control to parents and users without having to resort to paternalistic, content-based regulations, and such means would not require extensive parental involvement.¹⁵⁰ For instance, parents could install locking devices similar to those found on cable boxes that would either deny access to specific Internet services or provide a flag that objectionable content is found in a certain location.¹⁵¹ Similarly, the providers of particular Internet services, where indecent content is generally found, could be required to deny access to anyone who could not provide a credit card, a security code and proof of age.¹⁵² Furthermore, computer software companies have already begun the development of software programs that can filter out a predetermined set of words that a parent does not want their child to read.¹⁵³

into his or her home any more than an individual who turns on the radio.

149. See Cate, *supra* note 8, at 45 (stating that children are generally more computer literate than their parents); Kim, *supra* note 6, at 438 (discussing the level of computer literacy in children).

150. See *infra* notes 152-54, 159 and accompanying text; *Message*, *supra* note 5, at 1080 (arguing that the preferable method of regulation is to restore user control, rather than content-based regulations); Wright, *supra* note 130, at 493 (arguing that a regulatory scheme that focuses on user control over the flow of information is more appropriate because it requires less regulatory efforts, allows a wider range of services which are in demand, and promotes access to a diversity of information); *Censorship in Cyberspace*, *ECONOMIST*, Apr. 8, 1995, at 17 (stating that it is more appropriate to empower parents to control what their children do on-line) [hereinafter *Censorship*]; Joshua Quittner, *Vice Raid on the Net*, *TIME*, April 3, 1995, at 63 (quoting Harvard University Law Professor Lawrence Tribe who asserted that, although there is a legitimate need in protecting children from exposure to harmful materials on the Internet, such interest is better served by enabling parents to screen the information at home rather than by an outright ban).

151. See Kim, *supra* note 6, at 438; see also *Censorship*, *supra* note 150, at 17 (reporting that Playboy warns Internet visitors that "naked women are ahead," and that Prodigy and America Online define which services require parental approval).

152. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 134 (1996) (providing a defense to certain criminal prosecutions for those who have restricted access to indecent "communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number"); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130-31 (1989); cf. *Branscomb*, *supra* note 29, at 1952; Kim, *supra* note 6, at 438 (suggesting that this practice could be enforced by imposing liability on BBS operators who violate this requirement).

153. A consortium of computer software and networking companies, including Microsoft, Inc., Apple Computer, IBM, AT&T, Time Warner Inc., America Online, Prodigy and CompuServe are expected to have products available next year that will enable parents to control their children's computer use. *Self-Policing: The Way to Handle On-Line Porn*, *TACOMA NEWS TRIB.*, Sept. 18, 1995, at A6. A similar consortium consisting of Microsoft, Progressive Networks and Netscape have announced a plan to develop a rating system similar to the one already used for movies. Joshua Quittner,

Some argue that these technological procedures will not effectively protect children and adults from objectionable materials. They claim that existing technology cannot feasibly filter out or flag all unwanted messages because there are too many Internet postings, the postings come from so many different locations, and software filters cannot screen out images, the wide variety of colloquialisms, or symbolic terms.¹⁵⁴ Furthermore, even if the technology can work effectively, there will always be determined children who will eventually find ways to circumvent the restrictions and enter into prohibited territory.¹⁵⁵

The Supreme Court explicitly rejected this argument in *Sable*, where the Court found that the FCC's rules regarding credit cards, access codes, and scrambling devices represented a "feasible and effective" means to further the government's interest in protecting children.¹⁵⁶ Furthermore, in his concurring opinion in *Sable*, Justice Scalia stated that "a wholesale prohibition upon adults access to indecent speech cannot be adopted merely because the FCC's alternate proposal could be circumvented by as few children as the evidence suggests."¹⁵⁷ The flip-side to the risks inherent when children access the Internet is that adults will be reduced to reading "only what is fit for children."¹⁵⁸

Perhaps only time will tell whether technological innovations and non-content-based regulations will sufficiently protect children from

How Parents Can Filter Out the Naughty Bits, TIME, July 3, 1995, at 45; see also Berman, *supra* note 147, at 1632 (stating that the major Internet services already have a type of identifying data, known as a header, which could serve as a basis for screening out objectionable content); Rimm, *supra* note 8, at 1859 n.21 (stating that schools and parents can implement address filters that can "limit access only to known, acceptable locations").

154. See Meyer, *supra* note 7, at 1983-87. *But cf.* Rimm, *supra* note 8, at 1861 n.21 (stating that several research labs and universities are currently developing software, that might assist network operators in scanning databases to identify patterns in images which could locate the presence of nudity and other activities involving sexually explicit content). One commentator agrees that most parents lack the capability or resources to implement a site-blocking scheme because there are too many new World Wide Web sites and Usenet groups announced each day. *Id.* at 1859 n.21 (suggesting the need to develop a national or international rating system to help parents and schools implement appropriate safeguards).

155. See Branscomb, *supra* note 29, at 1952 n.95; Meyer, *supra* note 7, at 1989 (maintaining that the very structure of the Internet, which was designed to enable rerouting around obstacles, makes it almost impossible to effectuate the blocking of access to a particular Internet file or service); Rimm, *supra* note 8, at 1858-59, n.21 (describing a multitude of methods by which determined users can access "banned" Usenet groups); *Censorship*, *supra* note 150, at 17 (stating that children can still sneak dirty magazines from their parents).

156. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 125, 128-29 (1989). *But see supra* note 141

157. *Sable*, 492 U.S. at 132 (Scalia, J., concurring).

158. *Buder v. Michigan*, 352 U.S. 380, 383 (1957).

exposure to indecent messages or images. If these procedures are sufficient to protect children, then a total ban would be unconstitutional for failure to use the least restrictive means. However, if time teaches us that too many children are exposed to too much indecent content, then *Sable* suggests that a total ban may be necessary.¹⁵⁹ As Justice Scalia points out, the question becomes "how few children render the risk unacceptable[?]"¹⁶⁰ Arguably, the government's interest in protecting adults from unwanted exposure cannot justify a total ban because, like "dial-a-porn" and cable television, the Internet user must take affirmative steps to bring the world of cyberspace into the home. Users are not required to connect into the Internet. Instead, they do so at their own pleasure and can be forewarned of objectionable content.¹⁶¹

V. LIABILITY OF SYSTEM OPERATORS FOR USERS' MESSAGES

An important corollary to a discussion of what material a person can (or should) be liable for is an analysis of who can be liable for such material. As the case of *United States v. Thomas* demonstrates, a BBS operator can be criminally prosecuted for actively engaging in the transmission of obscene materials over the Internet.¹⁶² Despite this, the question remains whether sysops can be vicariously liable for the actions of users who post or send obscene or indecent materials through their networks. To date, there are no reported cases that have ruled on this issue. However, lower federal courts and at least one state court have had the opportunity to rule on vicarious sysop liability in the context of copyright infringement and defamation.¹⁶³

In *Cubby, Inc. v. CompuServe, Inc.*, a suit was brought against CompuServe for making available to its subscribers an allegedly defamatory statement made in a publication carried on CompuServe's

159. *Sable*, 492 U.S. at 129. *But see* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 134 (1996) (providing a good-faith defense to those who use reasonable and effective means to restrict access to minors, "including any method which is feasible under available technology"). Furthermore, legislative history reveals that the "conferees intend that this defense be construed broadly to avoid impairing the growth of on-line communications through a regime of vicarious liability." H.R. REP. NO. 458, 104th Cong., 2nd Sess., 1996 WL 46795 (1996).

160. *Sable*, 492 U.S. at 132 (Scalia, J., concurring).

161. *See supra* note 151; *Message, supra* note 5, at 1095 (arguing that the "tastes of the many need not be held hostage to the particular sensibilities of the few, or vice versa."); Quittner, *supra* note 153, at 45 (stating that CompuServe, a major Internet service provider, posts a written notice to its users "to be careful when they venture forth").

162. *United States v. Thomas*, 74 F.3d 701, 708 (6th Cir. 1996).

163. *See infra* notes 164-71 and accompanying text.

database.¹⁶⁴ Although CompuServe could decline to carry a given publication, once it decided to carry it, Compuserve had little or no editorial control over the content.¹⁶⁵ The court analogized a sysop's computerized database to the more traditional news vendors (public library, book store, and newsstand), and concluded that a "national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment."¹⁶⁶ Thus, the court held that the appropriate standard of review was whether CompuServe knew or had reason to know of the allegedly defamatory statements.¹⁶⁷

In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, plaintiffs sued Netcom (a BBS) for copyright infringement when one of Netcom's users posted a copyrighted article on Netcom's BBS.¹⁶⁸ The district court held that Netcom could not be held liable for direct infringement because Netcom did not take any affirmative steps directly resulting in the infringement, other than installing and maintaining a Usenet system that allowed its subscribers to post messages onto the system.¹⁶⁹ Netcom argued that subjecting a BBS to liability for direct infringement under these circumstances would

164. *Cubby v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

165. *Id.* at 140.

166. *Id.* (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)). The court further commented that applying a lower standard of review for electronic new distributors "would impose an undue burden on the free flow of information." *Id.*

167. *Id.* at 140-41. In a similar case, a New York state court held that Prodigy could be held liable for distributing a defamatory statement which was posted by one of its users. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished opinion). The court rejected Prodigy's claim that it served merely as a passive conduit, and focused on the fact that Prodigy had actually exerted editorial control over its network and had appointed board leaders to ensure conformity with its editorial standards. *Id.* at *6. Thus, Prodigy's "hands-on" approach concerning its editorial control "opened the company up to liability even though it did not have knowledge of the communication at issue." Goldman, *supra* note 7, at 1099-1102.

168. *Religious Technology Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1362 (N.D. Cal. 1995).

169. *Id.* at 1373. The court concluded that Netcom's actions were closely akin to those of an owner of a publicly-used copying machine, whose liability is analyzed "under the rubric of contributory infringement, not direct infringement." *Id.* at 1369. The facts of *Netcom* were complicated by a letter sent to Netcom by Plaintiffs demanding that the infringing user (Erllich) be kept off the BBS. *Id.* at 1373. However, Plaintiffs refused Netcom's request to prove ownership of the copyrights, and Netcom refused to kick Erllich off its BBS. *Id.* at 1367-68. Thus, since the infringing work remained on Netcom's BBS for a period of time after Netcom had actually received notice, the court denied Netcom's motion for summary judgment on the claim for contributory infringement. *Id.* at 1381.

force Usenet servers to perform the impossible task of screening every piece of information coming through their system.¹⁷⁰ The court agreed and stated that requiring Usenet servers to screen all messages coming through their systems “could have a serious chilling effect on what some say may turn out to be the best public forum for free speech yet devised.”¹⁷¹

In deciding whether sysops should be vicariously liable for the obscene or indecent messages posted by their users, courts will have to draw analogies between the sysops and more traditional First Amendment actors. Because sysops play a multitude of roles, they do not fit neatly into any one category. Rather, they face a “sliding scale” of analogous roles running from primary publisher to secondary publisher to common carrier.¹⁷² Primary publishers, such as newspapers, have virtually total control over all content that appears in the materials that they publish.¹⁷³ Secondary publishers have little or no editorial control over content, and generally cannot be held liable unless they know or had reason to know of the “defamatory (or obscene) nature of the material they publish.”¹⁷⁴ Common carriers, such as telephone companies, must transmit all messages regardless of the content,¹⁷⁵ and generally are not liable for the statements of

170. *Id.* at 1379.

171. *Id.* at 1377. The court rejected, as unworkable, a theory of infringement that extended liability to:

[C]ountless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. . . . Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from noninfringing bits.

Id. at 1372. *Cf. supra* notes 186-91 and accompanying text (discussing the impossibility of screening out the obscene materials from the non-obscene materials).

172. Faucette, *supra* note 3, at 1172; *see* Jensen, *supra* note 147, at 244 (asserting that computer bulletin boards have attributes associated with publishers, secondary publishers, and common carriers); David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 89 (1993); Schlachter, *supra* note 165, at 99-100, 137; *Message*, *supra* note 5, at 1067 (asserting that a sysop acts like a common carrier when they allow users to communicate with each other via e-mail, but they act like secondary distributors when they provide access to a variety of electronic databases). Problems arise when courts, faced with a new technology, attempt to apply legal doctrines which “were formulated in a world of magazines, books, and film.” Faucette, *supra* note 13, at 1181; *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1007 (2d ed. 1988) (contending that the law has been unable to keep up with the pace of technological change); Jonathan Gilbert, Comment, *Computer Bulletin Board Operator Liability for Users’ Misuse*, 54 FORDHAM L. REV. 439 (1985).

173. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

174. Faucette, *supra* note 13, at 1172; *see* Schlachter, *supra* note 165, at 115-16.

175. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979); *see* David K. McGraw, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-Mail*, 21 RUTGERS COMPUTER

others.¹⁷⁶

Sysops, who have a diminished ability to effectively exert editorial control over their users' messages, should be closely analogized to secondary publishers, which generally cannot be liable unless they know or had reason to know of the nature of the content that they carry.¹⁷⁷ However, a "reason to know" standard, in the context of criminal prosecutions, may run up against the constitutional requirement of scienter: the requisite degree of mens rea.¹⁷⁸ In *Smith v. California*, the Supreme Court struck down an ordinance that established strict liability for booksellers who possessed obscene books, regardless of whether they had knowledge of the books' contents.¹⁷⁹ The ordinance essentially imposed an obligation on the bookseller to become aware of the contents of every book in his shop.¹⁸⁰ Thus, the Court concluded that the public's access to reading material would be greatly limited because the bookseller would have to restrict his sales to those books that he actually inspected.¹⁸¹ Although the

& TECH. L.J. 491, 504 (1995); Schlachter, *supra* note 165, at 115.

176. See Faucette, *supra* note 13, at 1172-73; Jensen, *supra* note 162, at 250 (reciting three policy reasons why courts afford more protection to common carriers: first, to protect the public's right to quick and continuous communication service; second, to permit the public utility to comply with its statutory requirement of providing access to everyone; and third, the practical recognition that they do not exert control over the messages, but operate as a conduit); Schlachter, *supra* note 167, at 119; Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121, 132 n.72 (1987); cf. Huelster, *supra* note 30, at 872 n.46 (stating that courts have developed a three-prong test to determine what qualifies as a common carrier: "First, the carrier must have a 'quasi-public' nature. Second, a carrier must use standard business practices, not allowing case-by-case decisions about 'whether and on what terms to deal.' Third, the customer must be able to 'transmit intelligence of their own design and choosing.'") (citations omitted).

177. See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (comparing sysops to traditional news vendors such as a public library, a book store, or a newsstand); Faucette, *supra* note 13, at 1174; Gallagher, *supra* note 85, at 198 (stating that on-line services, like libraries and bookstores, function more as secondary distributors). But see Goldman, *supra* note 6, at 1102-03 (suggesting that commercial access providers, such as CompuServe and Prodigy may be treated as common carriers); McGraw, *supra* note 175, at 504 (asserting that network service providers are more analogous to telephone companies, which are not liable for the content of the communications they carry); Message, *supra* note 5, at 1092-93 (arguing that a sysop is more of a conduit than an editor and is unlikely to be liable for the content that it is compelled to carry).

178. See *Staples v. United States*, 114 S. Ct. 1793, 1797 (1994); *Mishkin v. New York*, 383 U.S. 502, 511 (1966) (stating that the scienter requirement serves to "avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.")

179. *Smith v. California*, 361 U.S. 147, 150 (1959).

180. *Id.* at 153.

181. *Id.*

Court did not pass on the requisite level of knowledge constitutionally required for obscenity prosecutions, it did suggest that the circumstances might warrant an inference that the bookseller was aware of the book's contents.¹⁸²

In *Hamling v. United States*, the Court elaborated on *Smith*'s scienter requirement, and held that it is constitutionally sufficient that an individual have knowledge or reason to know of the contents, character and nature of materials that he distributed.¹⁸³ However, the Court's liberal treatment of the term "knowledge" and the inherent uncertainty of already vague obscenity standards,¹⁸⁴ chills a great deal of constitutionally protected speech, especially when applied to Internet system operators.¹⁸⁵ Like the bookstore owner in *Smith*, a sysop has only a limited ability to monitor the large volume of content transmitted through its network.¹⁸⁶ Although a sysop may be more able than a bookseller to implement a computerized software system to monitor illegal content, sysops could not eliminate all such content.¹⁸⁷ There is simply too much to monitor, and even the installation of software scanning programs could not effectively

182. *Id.* at 154.

183. *Hamling v. United States*, 418 U.S. 87, 123 (1975) (arguing that to require that defendant had actual knowledge of the material's legal status would allow the "defendant to avoid prosecution simply by claiming that he had not brushed up on the law"); *Roth v. United States*, 354 U.S. 476, 491 (1957) (stating that the defendant must have a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices") (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)).

184. See *Smith v. United States*, 431 U.S. 291, 315-16 (1977) (Stevens, J., dissenting) (arguing that ascertainment of the obscenity standards is too subjective to identify criminal conduct and to delineate the boundaries of the First Amendment's protection); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79-80 (1972) (Brennan, J., dissenting); Brockwell, *supra* note 49, at 137 (asserting that the vagueness of *Miller*'s standards of "prurient interest" and "patently offensive" is further compounded when measured against the vague terms of "community standards" and "average person").

185. Cf. *Pope v. Illinois*, 481 U.S. 497, 515 (1987) (Stevens, J., dissenting) (arguing that vague standards promote selective and arbitrary enforcement and lessen the degree to which an individual has notice of what is proscribed); *Paris*, 413 U.S. at 87-91 (Brennan, J., dissenting).

186. See Goldman, *supra* note 6, at 1100 (claiming that "*Smith* stands for the proposition that distributors of large amounts of written material should not be held liable for random amounts of obscenity contained therein."); Faucette, *supra* note 13, at 1177; Jensen, *supra* note 147, at 219, 248; Kim, *supra* note 6, at 422, 425; Message, *supra* note 5, at 1084 (asserting that interactivity and infinite capacity will reduce the sysops editorial control); *Only Disconnect: Can Pornography in Cyberspace be Regulated?*, *ECONOMIST*, July 1, 1995, at 17; Charles Levendosky, *Cyber Censors: Big Brother Threatens to Oversee the Internet*, *L.A. DAILY J.*, Apr. 5, 1995, at 6.

187. See *infra* notes 188-191 and accompanying text.

separate the obscene from the non-obscene.¹⁸⁸ At most, scanning programs could search for certain key words.¹⁸⁹ But, given the complexity and vagueness of the obscenity definition, no system could take into account factors such as "average person" or "contemporary community standard" or "serious literary, artistic, political or scientific value."¹⁹⁰ It is unlikely that someone will ever develop software that can identify (or know) obscenity just by seeing it.¹⁹¹

To protect against criminal liability, sysops would have to manually inspect each posted message or develop software that envelopes far too much speech.¹⁹² Manual inspection would put the sysops in the same censorship role that the Court guarded against in *Smith*, and overbroad application of scanning software will chill too much constitutionally protected speech.¹⁹³ Moreover, with respect to indecency regulations, sysops face a potential conundrum. If the sysop can effectively filter out indecent content, then a total ban is not the "least restrictive" means.¹⁹⁴ However, if the sysop cannot effectively filter out indecent content, then it arguably cannot be held liable as a secondary publisher.¹⁹⁵ Thus, while a "constructive knowledge" standard for criminal prosecutions renders *Smith* virtually meaningless, an "actual knowledge" standard eliminates the sysops' incentive to

188. See Berman, *supra* note 147, at 1634 (arguing that even if such screening were possible, it would unduly restrict the free flow of information and diversity in the on-line world); Meyer, *supra* note 7, at 1980-84 (arguing that any attempt to police Internet images or text is impossible).

189. But see Rimm, *supra* note 8 (describing the development of a technology that could possibly search for and screen out sexual imagery).

190. See Goldman, *supra* note 6, at 1090-91, 1112.

191. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring) (claiming that although he could not attempt to define obscenity, he knew it when he saw it).

192. See Faucette, *supra* note 13, at 1165. Furthermore, there will be a gaping hole left in even the most comprehensive attempts by sysops to censor sexually explicit materials because users' e-mail may not be accessed without their consent. *Id.* at 1182 n.60 (citing the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, which is codified as amended in various sections of Title 18 of the United States Code); Goldman, *supra* note 6, at 1100-01; Handelman, *supra* note 6, at 712 n.21.

193. See Loftus E. Becker Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 230 n.125 (1989); Goldman, *supra* note 6, at 1117 (asserting that sysops, faced with ambiguous standards, will either shut down operations or search every file and delete those that the sysop believes contain obscenity); Kim, *supra* note 6, at 423 (maintaining that most sysops could not afford to comply with regulations that required constant monitoring, and as a result, legitimate speech would be chilled); Schlachter, *supra* note 167, at 125 (arguing that excessive sysop liability will reduce the availability of not only obscene, but also constitutionally protected speech).

194. See *supra* notes 153-55 and accompanying text.

195. See *supra* note 189 and accompanying text.

ensor protected speech.¹⁹⁶

VI. CONCLUSION: REFLECTIONS AND SUGGESTIONS

We have come a long way in over two hundred years since the Framers saw fit to protect our individual liberties through the Bill of Rights. We have witnessed the advancement of technological innovations such as the telephone, radio, television, cable television, fax machine, computer, and now the Internet. The introduction of each new technology has been accompanied by forceful government censorship efforts.¹⁹⁷ But, as Justice Stewart stated: "Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment chartered a different course. They believed a society can be truly strong only when it is truly free."¹⁹⁸ The Framers knew how critically important free speech is to a civilized society, which may be why they placed this invaluable protection in the First Amendment.

Nevertheless, the Supreme Court in *Roth v. United States*, immaculately conceived the notion that the First Amendment did not protect a certain class of speech that is "utterly without redeeming social importance."¹⁹⁹ The *Roth* decision, itself, is predicated on some type of late 1950s homogeneous belief that there exists a universally (or at least nationally) accepted class of speech that lacks social value, and that such speech can be readily distinguished from valuable speech.²⁰⁰ *Roth*, *Miller* and their progeny have provoked sharp criticism for their failure to provide a workable definition of obscenity, one which "adequately protects First Amendment values."²⁰¹

196. *Smith v. United States*, 431 U.S. 291 (1977); see *Faucette*, *supra* note 13, at 1177-78; *Loundy*, *supra* note 172, at 103; *Schlachter*, *supra* note 167, at 134 (arguing that a constructive knowledge standard is unduly burdensome); see also H.R. REP. NO. 458, 104th Cong., 2nd Sess., 1996 WL 46795, at *161 (suggesting that the attention is focused on "bad actors and not those who lack knowledge of a violation or whose actions are equivalent to those of common carriers"). However, the new Act itself explicitly states that "[n]othing in this section shall be construed to treat interactive computer services as common carriers" Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 135 (1996).

197. See *supra* note 41.

198. *Ginzburg v. United States*, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting).

199. *Roth v. United States*, 354 U.S. 476, 484 (1957).

200. Justice Brennan has claimed that the Court has always "demanded that 'sensitive tools' be used to carry out the 'separation of legitimate from illegitimate speech.'" *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79 (1973) (Brennan, J., dissenting) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

201. *Pope v. Illinois*, 481 U.S. 497, 513 n.7 (1987) (Stevens, J., dissenting) (noting that "the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues' involved in obscenity laws 'is incorrect . . .'" (citing ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY,

Even Justice Scalia, in his concurring opinion in *Pope v. Illinois*, suggested the need for the Court to reexamine *Miller*.²⁰² Scalia is not alone. Many Supreme Court Justices have repeatedly argued that obscenity, like indecency, should receive First Amendment protection and only then be constitutionally suppressed where the government demonstrates a compelling interest.²⁰³ The most notable compelling government interest cited is where the manner of distribution involves exposure to minors or to unwilling adults.²⁰⁴ Others have even gone further and asserted that the government should have the right to condemn sexist and violent pornography.²⁰⁵ Whatever compelling

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202. *Pope*, 481 U.S. at 505 (Scalia, J., concurring) (arguing that even introduction of the "fabled 'reasonable man' is of little help in the inquiry").

203. See *infra* note 204.

204. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 133-35 (1989) (Brennan, J., dissenting); *Pope*, 481 U.S. at 507 (Brennan, J., dissenting); *Id.* at 518 (Stevens, J., dissenting) (noting that the *Stanley* Court "recognized that there are legitimate reasons for the State to regulate obscenity: protecting children and protecting the sensibilities of unwilling viewers"); *Hamling v. United States*, 418 U.S. 87, 141-42 (1974) (Brennan, J., dissenting); *United States v. Orito*, 413 U.S. 139, 143 (1973) (holding that Congress could reasonably determine that a prohibition upon interstate transportation of obscenity is necessary to prevent a "legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 106-07 (1973) (Brennan, J., dissenting); *cf. Miller v. California*, 413 U.S. 15, 18-19 (1973); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) (distinguishing private possession from public distribution on the grounds that the former did not entail a danger of exposure to minors or unwilling adults); *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968); *Redrup v. New York*, 386 U.S. 767, 769 (1967) (*per curiam*) (reversing convictions of distributing obscene materials because there were no claims that "the statute in question reflected a specific and limited state concern for juveniles. . . . [and no] suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure . . .") (citations omitted); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (holding that the interest in preventing dissemination of obscene material to children does not justify a total suppression of such material).

205. See, e.g., Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 9-20 (1985) (arguing that pornography exploits, subordinates, suppresses, and degrades women); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 801-03 (1991) (suggesting that pornography incites abusive and aggressive treatment of women); Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107, 166-67 (1994) (arguing that violent pornography should be denied constitutional protection under the "fighting words" exception established in *Chaplinsky*). But see Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEXAS L. REV. 1097, 1100-01 (1994) (contending that suppressing pornography will actually have the effect of weakening women's liberation efforts); Meyer, *supra* note 7, at 1974-79 (claiming that censorship of pornography will only reinforce ignorance and repression of sexuality, which create the problems in the first place); Nadine Strossen, *A Feminist Critique of 'The Feminist Critique'*, 79 VA. L. REV. 1099, 1173 (1993) (claiming that there is no credible evidence linking exposure to sexist, violent imagery and sexist, violent

interest the Court might accept for governmental suppression of obscenity would fare better than merely holding obscenity outside the bounds of the First Amendment completely.²⁰⁶

How does all of this relate to the Internet? Perhaps the application of the current obscenity standard to the Internet will expose the vulnerability of the obscenity doctrine's underlying rationales.²⁰⁷ Since the Internet lacks meaningful geographical boundaries,²⁰⁸ the "contemporary community standard" is misplaced. Moreover, the private nature of Internet communications has blurred the line between public distribution and private possession of sexual materials, which further highlights the problem with a local or state "community standard." The policy behind applying the community standard—enabling communities to protect themselves from exposure to objectionable materials—is no more justified than a community protecting itself from private possession of obscenity (something the Court has held permissible).²⁰⁹

Under a standard tailored to the manner of distribution, the ultimate issue for sexually-explicit content on the Internet would be whether users could adequately control the content appearing on their screen, as well as what their children could access. If technology advances to the point where exposure to all unwanted material could be thwarted, then the government would no longer have a compelling interest in suppression.²¹⁰ On the other hand, if technology fails to effectively prevent the risk of exposure, then the government may legitimately assert regulatory authority to further its compelling interests. In the end, the likelihood of potential harm from exposure must rise to a very significant level to justify the enormous chilling

behavior); George C. Thomas III, *A Critique of the Anti-Pornography Syllogism*, 52 MD. L. REV. 122, 124 (1994) (suggesting that the lack of evidence of a causal link between porn and rape is "more persuasive than the evidence to the contrary").

206. The Court has previously been able to allow more restrictive governmental regulations of obscenity under a rational basis analysis, an approach that has perhaps been the underlying source of debate among Justices over the years. However, if the Court were to place obscenity in the proper First Amendment framework, then many of the definitional problems such as vagueness, lack of sufficient notice, and community standards, would also require reexamination.

207. See Chiu, *supra* note 90, at 207 (claiming that the process of computer network communications "raises questions about the basic reasoning behind the regulation of obscenity through local community standards, because local communities are arguably not affected in the process").

208. See *supra* note 103 and accompanying text.

209. See *supra* note 109 and accompanying text (comparing the Court's rationale in *Stanley* and *Orito*).

210. The same would be true for "non-hard-core" pornography (classified as "indecency"), regardless of this proposed scheme.

effect that vague and overbroad laws will have on one of our most precious and guarded rights, freedom of speech.

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